COMMANDER'S DIGEST
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OVERSEAS LAW: How it Affects Americans

American forces stationed in foreign countries are there by invitation, by agreement with the host nations. They are guests.

Imagine what it would be like to have thousands of foreign military personnel stationed in Illinois or Florida. If they spoke a different language, had different laws and customs, had more money to spend than Americans and showed little interest in or respect for this nation's way of life, they would quickly become unpopular.

That's the situation American service personnel find themselves in in many parts of the world. Even though the people of other countries understand the reasons U.S. forces are there, they are not necessarily happy about it. After all, it's *their* country.

Therefore, it's a good idea to know the legal rights, privileges, and obligations of U.S. service members under the agreement between the United States and the host country.

COLLECTIVE SECURITY

American forces are stationed in many countries of the world, principally in Europe and Asia. They are there because these nations have learned, by bitter experience, that enduring peace depends on collective security. That is, nations have banded together to protect themselves and to guarantee peace in their areas.

In the years leading up to World War II, totalitarian nations preyed upon their weaker neighbors.

The end of World War II found most of the nations of Europe exhausted and shattered. In a few swift years the Soviet Union, through threat of external force and infiltration by native Communist movements, established its domination over Poland, Hungary, Rumania, Bulgaria, Albania, Czechoslovakia and East Germany. In the Far East, mainland China fell to the control of the Communist armies of Mao Tse-tung. The United States stood as the only nation with enough wealth and power to oppose the expansion of communism.

The United Nations did not have the power to stop this expansionist movement. But under the U.N. Charter, nations are permitted to form regional alliances for mutual protection against aggression. That's how the North Atlantic Treaty Organization (NATO) and other, similar mutual defense organizations came into being.

As the major military power of the free world, the United States was called upon to furnish much of the armed strength needed to guarantee the security of its NATO partners and other allies in other parts of the world. Even today, many years later, the presence of American forces is still necessary to guarantee peace.

NATO came into being in 1949. The NATO nations agreed to permit other member nations' military units on their territory as required by overall NATO defense planning. This meant the stationing of friendly forces in large numbers in other countries during peacetime.

A sovereign nation is one that has independent political authority. One of the marks of national sovereignty is the element of control or legal authority over all persons in its territory. This authority, also called jurisdiction, extends to most aliens as well as to the

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country's own nationals. Unless there is an agreement to the contrary, all persons are subject to another nation's laws while they are visiting or residing in that country. Should an alien commit a crime, he can be tried in that nation's courts, according to its system of criminal justice, and if convicted, punished. If a non-citizen injures another person or damages his property, he can be sued for damages.

This jurisdiction, or legal authority over persons, applies also to foreign military personnel in peacetime. So, in the absence of any agreement to the contrary, U.S. military personnel and civilians abroad in peacetime generally are subject to the laws — and may be tried in the courts — of the country they are visiting or in which they are stationed.

When U.S. forces were sent to friendly countries after World War II, special agreements were worked out with each nation. These agreements varied from country to country. They represented the extent to which each country was willing to share its jurisdiction over American forces with U.S. authorities.

The United States has agreements with many countries concerning the stationing of forces in their territories. Generally speaking, the most important of these agreements now contain the essential protections and privileges embodied in the Status-of-Forces Agreement which governs the NATO countries.

UNIFORM RULES

When the North Atlantic Treaty Organization came into existence in 1949, it was apparent that military personnel of one NATO country might be stationed in the territory of another for extended periods of time. So it became desirable to establish uniform rules for handling legal matters involving servicemen of one NATO country in another member country. This was true not just for criminal cases, but also for civil claims, taxes, customs and the like. Negotiations led to the signing of a Status-of-Forces Agreement (SOFA) in June 1951. After considerable debate, the U.S. Senate approved the agreement in July 1953.

The agreement is in effect among all the member nations of NATO except Iceland. The NATO SOFA defines the legal status of the armed forces of each member nation when stationed in the territory of another. It sets forth the rights, privileges, and responsibilities of visiting forces, and of individual members of such forces, including civilian employees and dependents of both military and civilian personnel.

Fourteen NATO countries subscribe to the general provisions of the SOFA:

- the United States
- Canada
- the United Kingdom
- Belgium
- Denmark
- France
- Italy
- Luxembourg
- the Netherlands
- Norway
- Portugal
- Greece
- Turkey
- the Federal Republic of Germany.

In some countries, such as Germany and the Netherlands, there are supplemental agreements that confer additional benefits on members of the United States forces. In Iceland the status of U.S. forces is governed by a separate agreement similar to the NATO formula.

The laws, and indeed the legal systems, of these countries vary. How these differing laws and legal systems affect U.S. forces concerns American overseas. Besides conferring privileges and immunities upon the members of U.S. forces, the NATO SOFA also expressly requires them to respect the law of the country where they are assigned.

The Agreement governs the relationship between our Armed Forces and foreign countries in matters of criminal jurisdiction, passport and visa regulations, taxes, claims, driving licenses, airport regulations, and other civil and legal matters.

It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisoned in foreign prisons.

OVERSEAS LAW

CRIMINAL JURISDICTION

As mentioned, a sovereign nation has jurisdiction, or legal authority, over all persons within its territory. But under the NATO SOFA, the host country gives up some of this element of control. In certain types of offenses, jurisdiction is granted to the visiting armed forces' country.

The key to the legal status of an American overseas with the Armed Forces if he is accused of a crime is this matter of jurisdiction. Whether he will be tried by court-martial or stand trial in a foreign court depends on which country has *primary jurisdiction,* the United States or the host country.

Under the NATO Agreement, the United States has *exclusive jurisdiction* over certain categories of offenses. Some actions are punishable under the Uniform Code of Military Justice (UCMJ) but not under the laws of the host state. For example, evasion of U.S. income tax does not violate German or Belgian law. Violations such as AWOL (absent without leave), desertion, or refusal to obey a lawful order are purely military offenses. The U.S. military authorities have the sole right to try such cases.

The host state has the exclusive jurisdiction over members of our military forces in cases where the offense is punishable by that country's laws, but not by the UCMJ — for example, a customs violation or a minor traffic offense.

In all other offenses, the Agreement establishes a formula under which both nations have jurisdiction. This is called concurrent jurisdiction. For certain types of offenses the United States has the primary right to try offenders, and for other types of offenses the host country has primary right to prosecute an offender.

If a serviceman is involved in a crime overseas, the nation which has primary jurisdiction has the right to bring him to trial.

The United States has primary jurisdiction over its military personnel in three categories of offenses:

- Crimes solely against the property or security of the United States.
- Offenses rising out of any act or omission done in the performance of official duty.
- Crimes solely against the person or property of another U.S. serviceman, a civilian employee, or a dependent.

In all other crimes, the host state retains primary jurisdiction. If a U.S. serviceman, while off duty, commits a crime against the person or property of a foreign national, local authorities have the primary right to bring him to trial. Unless the host country waives its right to primary jurisdiction, the accused will be prosecuted under the procedures of that country's criminal justice system. If convicted, he will be punished in accordance with its laws.

When an American military man or woman is accused of a crime over which the host country has primary jurisdiction, U.S. authorities may request a waiver of jurisdiction. That is, they may ask the local law enforcement authorities to transfer the offender to the legal control of the United States for prosecution. The SOFA obligates the host country to give "sympathetic consideration," to such a request. It is U.S. policy to request a waiver in practically all cases involving military personnel. In the majority of them, the requests have been granted.

U.S. authorities have primary jurisdiction over an offense "arising out of any act or omission done in the performance of official duty." "Official duty" should not be confused with the terms "on duty" or "in the line of duty," which may be used in administrative actions. A few cases will illustrate the difference.

—An American soldier on patrol duty stops his jeep, breaks into the house of a local citizen and steals an antique clock. Although on duty no one is going to argue that his actions are "in performance of official duty." The host country would have primary jurisdiction in his case.

—An airman on leave is driving a rented automobile. He hits a pedestrian and drives away from the scene of the accident. Under military regulations he is "in line of duty" because his absence is authorized. The hit-and-run accident, however, did not take place in the airman's performance of duty. He had no duties to perform at the time. Here again, the host country and not U.S. military authorities would have the primary right to bring charges against the man and prosecute him.

—An American sailor is driving a government vehicle on his regular daily mail run to the Fleet Post Office branch, traveling by a normal route. He has an accident. Here the act clearly arises out of his performance of duty: The United States has primary jurisdiction in his case.

CUSTODY OF ACCUSED

When a serviceman is arrested and accused of a crime—which nation will take him into custody? That depends on two things: who arrests him, and which nation has primary jurisdiction.

If he is arrested by U.S. military authorities for an offense over which the United States has primary jurisdiction, he will of course, remain in U.S. custody. If local police arrest him for such an offense, they will turn him over to the American authorities.

If a military member is arrested by U.S. authorities for an offense over which the host country has primary jurisdiction, the NATO SOFA allows the United States to retain custody until he is officially charged with a violation of local law. Even after he is charged, American authorities will do their best to retain custody of the accused until his trial and all appeal procedures have been completed.

If foreign police arrest a U.S. serviceman for an offense subject to the primary jurisdiction of their country, they are authorized under the Agreement to retain him in their custody. They may, as a matter of courtesy, surrender the serviceman to American authorities. In Germany, a supplementary agreement grants custody to the United States until the accused is either acquitted or is convicted and begins to serve a sentence involving confinement. At that point, the convicted criminal will be transferred to a German prison.

RIGHTS OF ACCUSED

The NATO Status-of-Forces Agreement was debated at some length in the U.S. Senate before it was finally approved. The principal concern of the senators was to assure that a serviceman accused of a crime overseas would be guaranteed his basic Constitutional rights as an American citizen.

U.S. service personnel who are tried in the courts of NATO countries are entitled to certain protections and rights that assure a fair trial by U.S. standards. In other countries where our forces are stationed, they generally enjoy similar rights.

The NATO Agreement specifically provides an American military member, a civilian employee of the military, or a dependent of either with the following rights:

- To be accorded a prompt and speedy trial.
- To be informed in advance of the charges against him.
- To be confronted with the witnesses against him.
- To compel the appearance of witnesses in his favor.
- To have legal counsel of his own choice for his defense.
- To have the services of a competent interpreter.
- To have a representative of his own Government present at the trial (when the rules of the court permit).

When a U.S. national subject to U.S. military law is tried for an offense by a foreign court in the country where he is stationed, he is entitled to have a U.S. Government representative as an observer during the trial. This observer, usually a lawyer of the Armed Forces, notes the progress of the trial and makes a full report to the proper military authority.

This observer is not a participant in the defense and does not become involved in the proceedings. He may, however, advise defense counsel of the rights of the accused under applicable agreements.

The trial observer's report is reviewed by higher authority to determine whether the accused was granted all the safeguards guaranteed by the Status-of-Forces Agreement, and whether he received a fair trial. If a serviceman has been denied any guaranteed rights or otherwise unfairly prosecuted, U.S. authorities will take action, through military or diplomatic channels, to protect his rights.

OTHER SAFEGUARDS

When it ratified the NATO SOFA, the Senate passed a resolution requiring that Congress be notified:

—Whenever a foreign country refuses to waive jurisdiction in a case where it appears that the accused will not be protected because of the absence or denial of Constitutional rights he would enjoy in the United States.

—If an accused person is not granted, during his trial, the rights spelled out in the Status-of-Forces Agreement.

A law passed by Congress in 1956 authorizes the Armed Forces to pay, for military personnel tried in foreign courts, the following:

- Counsel fees
- Bail
- Court Costs
- Other trial expenses, such as an interpreter's fees.

This authority has been used in virtually all cases. It has enabled accused U.S. service personnel to hire private attorneys at Government expense. Because they are not subject to the Uniform Code of Military Justice, civilian employees and dependents do not qualify for assistance under this law.

The United States will not pay fines or civil damages for which an individual is liable.

Servicemen will not be required to reimburse the United States for payments made for counsel fees, court costs, and other trial expenses. However, should a serviceman willfully cause forfeiture of bail that has been posted for him, he will be required to reimburse the Government for the amount of the bail.

A military member who has been tried by a foreign court cannot be tried again by court-martial for the same offense in the country where he was originally tried.

However, a serviceman may be tried for a separate offense against the Uniform Code of Military Justice associated with the same incident. For example, if a serviceman, while absent without leave, assaults a local

national, he may be tried in a local court for the assault. He also may be tried by court-martial for being absent without leave.

FOREIGN PRISON CONFINEMENT

The Department of Defense seeks to assure that U.S. military personnel . . . when confined in foreign penal institutions are accorded the treatment and are entitled to all the rights, privileges, and protections of personnel confined in U.S. military facilities.

When an American serviceman is confined in a foreign prison, he is not abandoned by the U.S. Armed Forces. His welfare and the protection of his rights continue to be the responsibility of his military superiors.

U.S. officials, to the extent permitted by local law, provide U.S. personnel with items and services they would receive if confined by American forces. These include legal assistance, medical and dental care, medicine, health and comfort items, and supplemental food and clothing.

Service regulations require that the commanding officer or his representative visit a U.S. serviceman confined in a foreign prison at least every 30 days. Conditions of confinement and the health and welfare of the prisoner will be observed and reported. A military lawyer will visit the prisoner once a month. Chaplains and medical officers will visit him periodically to provide for his spiritual and physical needs.

If permission for these visits is denied without apparent good cause, or if it appears that an individual is being mistreated or that the conditions of his confinement are substandard, U.S. authorities will take steps to seek corrective action.

Except in unusual cases, no member of the U.S. Armed Forces confined in a foreign penal institution will be discharged or separated from the service until the completion of his prison term and his return to the United States.

Conditions in foreign prisons vary from country to country, just as they do in the different states. Reports submitted by U.S. authorities who make periodic visits to prisons where Americans are confined indicate that conditions in these penal institutions are generally satisfactory.

STATUS OF U.S. FORCES

Since the NATO Status-of-Forces Agreement was first negotiated in the early 1950's, this country has signed SOFAs with several other nations in which U.S. forces are stationed. Most of them are patterned after the NATO Agreement. All of them provide for concurrent criminal jurisdiction over certain types of offenses by the United States and the host country.

These agreements with non-NATO countries provide satisfactory protection of the U.S. serviceman's basic rights as an American citizen. Variations from the NATO SOFA are generally favorable to American interests. One country may broaden the definition of "visiting force." Another may waive primary jurisdiction more readily. A third may more freely surrender custody of an accused American serviceman.

The Treaty of Mutual Cooperation and Security between the United States and Japan contains essentially the same provisions as the NATO Agreement. The chief difference lies in the term "visiting force". Any U.S. serviceman present in Japan is considered a member of the "force." For example, a serviceman stationed in Korea but on leave in Japan comes under the agreement and is entitled to its benefits.

The Philippine Base Rights Agreement of 1947 was amended in 1965 to include essentially the same criminal jurisdiction provisions as the NATO Agreement.

At the request of the United States, Philippine authorities will give "sympathetic consideration" to the matter of waiving their right to primary jurisdiction.

A Status-of-Forces agreement between the United States and the Republic of Korea went into effect in 1967. It too is essentially patterned after the NATO Agreement.

Korean authorities have agreed to waive their primary right to exercise jurisdiction over U.S. servicemen except in cases "of particular importance." Arrangements have been made under which U.S. military authorities are not required to request a waiver in each case. Instead, they inform Korean authorities of offenses subject to Korean primary jurisdiction. Unless notified within 15 days from the date of notification that Korean authorities consider it "of particular importance" that Korea take jurisdiction in a particular case, the United States is free to exercise jurisdiction in the case.

The Status-of-Forces agreement with Korea guarantees an accused American serviceman the same rights spelled out in the NATO SOFA. In addition, the Korean Agreement specifies other basic rights to which an accused is entitled. These include:

- Protection from self-incrimination.
- Prohibition of cruel and unusual punishment.
- Protection against prosecution for an act that was not against the law at the time it was committed.
- Protection against legislative acts that punish an individual without judicial trial.
- Protection against double jeopardy.

Further, U.S. authorities have custody of an American serviceman being prosecuted in a Korean court. He remains in American custody until all judicial proceedings, including any appeals, have been completed.

The Status-of-Forces Agreement with the Republic of China (Taiwan) has been in force since 1966. Its criminal jurisdiction provisions closely follow those of the NATO SOFA.

The Chinese Agreement, like the Korean, provides that the Chinese authorities waive in advance their primary right to exercise jurisdiction. The Chinese have the right to recall their waiver in any particular case where the "major interests of Chinese administration of justice make imperative the exercise of Chinese jurisdiction." After being notified by the Americans of a particular offense, the Chinese have 21 days to recall their waiver and take jurisdiction in the case.

In Taiwan, the United States retains custody of an American serviceman being prosecuted in the Chinese courts until the conclusion of all judicial proceedings.

The Status-of-Forces Agreement in effect with Australia since 1963 follows the pattern of the NATO SOFA. Australia has agreed to give sympathetic consideration to requests for waiver of its jurisdiction in criminal cases where it has primary jurisdiction.

The latest of U.S. SOFAs is the 1970 Agreement of Friendship and Cooperation with Spain. Its criminal jurisdiction provisions are based on the NATO model.

Within 15 days after Spanish authorities have initiated proceedings against a U.S. serviceman, the United States may request a waiver of Spanish primary jurisdiction. Unless Spain responds within 30 days that there is a particular Spanish interest in retaining jurisdiction, the U.S. request will be considered to have been granted.

MAAGS AND MILITARY MISSIONS

Besides U.S. Armed Forces based in foreign countries under treaties for mutual defense, the United States has, through separate agreements, Military Missions and Military Assistance Advisory Groups (MAAGS) in a number of countries. Most of these units are small. Their job is to help train the armed forces of the host country in the use of U.S. arms and equipment. They also help to determine what military assistance is needed.

Each of these specialized Missions and MAAGs is set up according to an agreement between the United States and the country concerned. The legal status of MAAG and Mission personnel varies from country to country:

- Military Mission personnel generally are subject to the concurrent jurisdiction of the United States and the country in which they are stationed.
- In most countries MAAG personnel are not subject to the criminal jurisdiction of the local courts.
- In some countries MAAG personnel enjoy the same degree of diplomatic immunity as members of the same rank in the U.S. Foreign Service stationed in that country.

Members of Military Missions and Military Assistance Advisory Groups should consult their commanding officers as to their exact legal status in the country to which they are assigned.

CIVILIANS AND DEPENDENTS

In 1960 the U.S. Supreme Court held that civilians are, with few exceptions, not subject to the Uniform Code of Military Justice in peacetime. Thus, the United States does not have criminal jurisdiction over military dependents or civilian employees and their dependents living in foreign countries. These individuals fall under the jurisdiction of the host country—their offenses are punishable by the law of that country.

Service regulations direct military commanders, as much as possible, to assist civilian employees and dependents in the custody of foreign authorities or confined in foreign penal institutions.

SOFA AND FOREIGN CLAIMS

When large numbers of Americans are stationed in a foreign territory, incidents inevitably arise that result in civil claims against the U.S. military forces. Effective and timely settlement of claims does much to enhance the prestige of the United States. It also makes the presence of American military forces more acceptable to the people of a foreign nation.

To avoid friction, provisions are made in the Status-of-Forces Agreements for the prompt settlement of claims arising out of the activities of U.S. Armed Forces.

U.S. service regulations authorize the administrative settlement of claims which are caused by a member or civilian employee of U.S. forces or which result from non-combat activities of those forces. U.S. military authorities administer the entire foreign claims program so as to take full advantage of its favorable impact on the foreign relations of the United States.

Under the NATO Status-of-Forces Agreement, a foreign national's claim against a U.S. serviceman acting in an official capacity is processed by the host country. The host country determines whether the claim is to be paid and the amount to be paid. The host country pays the claimant, and then is reimbursed by the United States for 75 per cent of the amount. To insure that local claims authorities are not unduly generous with the funds of the

visiting country, the agreement provides that the host country will pay 25 per cent of the cost of settlement.

When a claim against the U.S. Forces arises out of an act done not in the performance of official duty, the host country investigates the claim. Its recommendation about settlement is forwarded to U.S. authorities. If the United States pays the claim, it bears the entire cost of payment. The serviceman involved is not required to reimburse the U.S. Government.

On the other hand, a U.S. serviceman may be sued as an individual for damages for an act not arising out of official duty, and a foreign court may hand down a judgment against him. In such a case, payment of damages is the full responsibility of the individual Service member, unless the United States has already made a payment that has been accepted by the claimant in full settlement of his claim.

A civil suit for damages may also be brought against an individual U.S. serviceman for an act done in the performance of official duty. However, even though judgment is given for the claimant, the defendant's personal property may not be used to satisfy the claim.

OTHER PROVISIONS OF SOFAS

The NATO Status-of-Forces Agreement contains several additional privileges and obligations for U.S. personnel stationed in a country that is a party to the Agreement. Similar privileges and obligations apply in other countries where U.S. forces are stationed.

The privileges include:

- Exemption from foreign taxes on tangible personal property and on salaries paid servicemen by the U.S. Government.
- The right to import, free of duty, furniture and personal effects at the time of first arrival for duty, or at the time of the first arrival of dependents to join servicemen. They may also import, free of duty, automobiles for their personal use and their dependents.
- Acceptance, without additional fee or test, of military driving permits and driver's licenses issued to military personnel by any of the states.
- Exemption of members of the Armed Forces from passport and visa regulations and from immigration

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inspection when entering any NATO country. (This does not apply to civilians or dependents).

The obligations include:

- Payment of local road taxes for use of private vehicles, if required.
- Permission of host country authorities to sell locally any item imported duty-free into the country.
- Compliance with foreign exchange regulations.
- The duty to respect the laws of the host country.

POINTS OF INTEREST

- A sovereign nation has legal authority, or jurisdiction, over everyone in its territory. All persons in the country, unless they have diplomatic immunity, are subject to that country's laws.
- A Status-of-Forces Agreement defines the legal status of the armed forces of one nation when stationed in the territory of another.
- Under a SOFA, the host country agrees to give up some of its jurisdiction over military personnel of a "visiting force."
- The host state has exclusive jurisdiction over civilian employees and dependents of military or civilian personnel.
- The United States will pay the trial expenses for an American serviceman being tried for a crime by a foreign court.
- If an American serviceman is confined in a foreign penal institution, the United States will seek to assure that he is accorded the same treatment and protections as personnel confined in U.S. military facilities.
- A U.S. military member can be sued in the civil courts of a foreign nation, and damages can be awarded against him.
- All Americans abroad have the duty to respect the laws of the nations they visit.

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